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Supreme Court of the United States

OCTOBER TERM, 2002

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AOL TIME WARNER INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Does Congress have the power under the Copyright Clause to extend the term of existing copyrights?

2. Does the Sonny Bono Copyright Term Extension Act violate the First Amendment?

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Cases

Alden v. Maine,
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Almendarez-Torres v. United States,
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Bloomer v. Millinger,
68 U.S. (1 Wall.) 340 (1863) 9

Chaffee v. Boston Belting Co.,
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Charles River Bridge v. Warren Bridge,
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McClurg v. Kingsland,
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McCulloch v. Maryland,
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Middendorf v. Henry,
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Miller v. French,
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Myers v. United States,
272 U.S. 52 (1926) 11

National Mut. Ins. Co. v. Tidewater Transfer Co.,
337 U.S. 582 (1949) 7

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 11

Oetjen v. Central Leather Co.,
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Pennock & Sellers v. Dialogue,
27 U.S. (2 Pet.) 1 (1829) 9

Rummel v. Estelle,
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Sony Corp. of Am. v. Universal City Studios, Inc.,
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Stewart v. Abend,
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Stewart v. Kahn,
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United Dictionary Co. v. Merriam Co.,
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United States v. Doremus,
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Constitutional Provisions, Treaties and Statutes

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Act of Feb. 3, 1831, § 1, 4 Stat. 436-39 ..... 9, 21

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Act of Mar. 4, 1909, § 23, 35 Stat. 1080 ..... 9, 22

Copyright Act, Pub. L. No. 94-553,
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S. Rep. No. 104-315 (1996) ..... *passim*

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141 Cong. Rec. S3391-93 (daily ed. Mar. 2, 1995) 17

143 Cong. Rec. S6048 (daily ed. June 2, 1997) 19

GAO Report on Intellectual Property Protection Abroad,
Apr. 1, 1987, in 1987 Copyright L. Rep.,
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Hearings on S. 1301 & S. 1971 Before the Subcomm. on Patents, Copyright & Trademarks of the Senate Comm. on the Judiciary,
100th Cong., 2d Sess. (1988) 23

Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, Cong. Research Serv.
Rep. 16 (May 11, 1998) 16

Other Authorities

Council Directive 93/98, 1993 O.J. (L 290/9) 17, 18

Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* (1967) 20

United States v. Lopez,
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Woodworth v. Wilson,
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Constitutional Provisions, Treaties and Statutes

U.S. Const. art. I, § 8 ..... *passim*

Berne Convention, art. 18(1) 29

Act of May 31, 1790, §§ 1 & 3, 1 Stat. 124-25 ..... 9, 21

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Act of Mar. 3, 1891, § 13, 26 Stat. 1106 22

Act of Mar. 4, 1909, § 23, 35 Stat. 1080 ..... 9, 22

Copyright Act, Pub. L. No. 94-553,
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Pub. L. No. 105-298,
§ 102, 112 Stat. 2827-28 (2000) 9

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Background Legislative Materials

H.R. Rep. No. 105-452 (1998) 17, 18, 20, 27

S. Rep. No. 94-473 (1975) 22, 24

S. Rep. No. 104-315 (1996) ..... *passim*

134 Cong. Rec. H3082 (daily ed. May 10, 1988) 25

141 Cong. Rec. S3391-93 (daily ed. Mar. 2, 1995) 17

143 Cong. Rec. S6048 (daily ed. June 2, 1997) 19

GAO Report on Intellectual Property Protection Abroad,
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New Dev. (CCH) ¶ 20,438 28

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100th Cong., 2d Sess. (1988) 23

Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, Cong. Research Serv.
Rep. 16 (May 11, 1998) 16

Other Authorities

Council Directive 93/98, 1993 O.J. (L 290/9) 17, 18

Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* (1967) 20

Tamara Conniff, *Sea Changes in Music Biz Leave Rank and File Adrift*, Hollywood Rptr., June 21, 2002 15

Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. Pa. L. Rev. 469 (2000) 23

Ulysses S. Grant, *Memoirs and Selected Letters* (Library of America 1990) (1886) 18

Edna Gundersen, *Any Way You Spin It, the Music Biz Is in Trouble*, USA Today, June 5, 2002 16

2 James Kent, *Commentaries on American Law* (1827) .. 22

William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 363 (1989) 18, 19

4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (1998) 13, 21, 23

Thomas Paine, *Letter to the Abbe Raynal, on the Affairs of North America* (1782), *in The Complete Writings of Thomas Paine* (Philip S. Foner ed., 1945) 21

Arnold Plant, *The Economic Aspect of Copyright in Books*, 1 Economica (n.s.) 167 (1934) 30

Barbara A. Ringer, *The Role of the United States in International Copyright – Past, Present, and Future*, 56 Geo. L.J. 1050 (1968) 22

INTEREST OF *AMICUS CURIAE*

AOL Time Warner Inc. ("AOLTW") is one of the world's largest holders of copyrights.[1] The fields of creative endeavor in which it generates new copyrights and utilizes existing ones are broad and diverse, including motion pictures, television, literature, magazine publishing, news production, sound recordings, musical compositions, Internet content, comic books, and more. In almost every corner of the copyright sectors of the economy, entities such as Warner Bros., Time, Warner Music Group, CNN, HBO, and AOL are innovative leaders dramatically changing how people across the globe are informed and entertained.

Among the copyrights currently owned by AOLTW are approximately 6,500 motion picture feature titles, 32,000 television episodes, and 8,000 cartoons. This includes the Turner film library, created through numerous acquisitions over many years, which includes hundreds of classic films, such as *Casablanca*, *Citizen Kane*, *The Wizard of Oz*, *Gone with the Wind*, and *Singin' in the Rain* – many of which would no longer be subject to copyright protection in the United States if recent copyright term extensions were invalidated. The CNN news archives contain a massive and unprecedented collection of worldwide video news footage compiled over the past thirty years. DC Comics alone has authored more than 6,000 copyrighted works in the past two decades. In the music industry, AOLTW owns hundreds of thousands of copyrighted musical compositions and sound recordings, and each year it releases more than 2,000 new albums and sells more than 100 million compact discs in the United States alone.

AOLTW has developed a global perspective from its various roles in creating, distributing, and marketing content and from its participation in international markets for

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[1] The parties consented to this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amicus curiae* state that they alone authored this brief, and no other persons or entities made a monetary contribution to its preparation or submission.

publishing, television, motion pictures, music, and the Internet. AOLTW invests many billions of dollars annually to produce and distribute new creative works, in ventures that are increasingly international in scope and involve virtually every country with viable markets. The availability of such investment, including the capacity to finance, market, and distribute new and existing works throughout the world, has become a critical feature of modern artistic activity in every field where AOLTW is involved. Indeed, AOLTW is now one of the largest sources of *new* copyrights registered in the United States each year.

AOLTW respectfully submits this brief to illuminate the various considerations that justify the Sonny Bono Copyright Term Extension Act, 17 U.S.C. §§ 301-04 ("CTEA"), including those uniquely applicable to international competition in the copyright sectors of the economy, in the context of settled principles of judicial review of legislative action.

INTRODUCTION

Petitioners are pressing the Court to declare that Congress exceeds its legitimate authority under the Copyright Clause when it enacts a law extending the term of existing copyrights. It cannot be stated too strongly that such a provision has been part of *every* copyright law Congress has enacted since the First Congress in 1790. For it is clear that "the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land." *Field v. Clark*, 143 U.S. 649, 691 (1892).

Moreover, acceptance of petitioners' premise at this late date would create massive disruption and upend substantial investment-backed reliance interests. It could cast doubt on previous laws extending copyright terms, including the long-debated comprehensive overhaul of the copyright laws enacted in 1976, *see* Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541

(1976), as well as more recent amendments involving rental rights and digital performance rights for sound recordings. In the four years since the CTEA was enacted – and in the quarter-century since the Copyright Act became law – a host of mergers and acquisitions have occurred, and innumerable licenses and contracts have been executed, that depend on valuations of copyrighted works made in line with those prior amendments. The *amicus curiae* AOL Time Warner Inc. is itself the product of several such transactions. Invalidation of those laws now would trigger vast, unanticipated transfers of wealth – including some of the very transfers Congress strove to avoid, from domestic producers to foreign consumers, when it enacted the CTEA to boost existing export revenues – and would wreak havoc with current business plans, settled property rights, and related investment-backed expectations.

SUMMARY OF ARGUMENT

1. In 1998, Congress enacted the CTEA pursuant to its enumerated powers under the Copyright Clause. *See* U.S. Const. art. I, § 8, cl. 8. Under the Court's longstanding precedent, Congress may exercise its enumerated powers as long as its actions are reasonably related to any plausible conception of its legitimate ends. Courts do not otherwise gainsay the policy choices that Congress makes in exercising its express powers unless those judgments clash with fundamental institutional values embodied in the Constitution – namely federalism, the separation of powers, and individual rights. As no such issues are genuinely presented here, the Court should assess the validity of the CTEA under its traditionally permissive approach to evaluating Congress's determinations about how to implement its enumerated powers.

2. In arguing that the CTEA exceeds Congress's authority under the Copyright Clause, petitioners and their *amici* commit two crucial errors. First, they simply assume that the *only* way Congress can legitimately seek to promote the progress of science and the arts in this country is by inducing

individuals to create new works to advance their own individual economic self-interest. This rigid analysis of the relevant incentives is wholly inadequate to the grave task of judging the constitutionality of an Act of Congress. In fact, corporations, organizations, and other entities have contributed greatly to transforming the copyright sectors into major engines driving the American economy – which employ and finance the work of countless individual creators and are now essential to progress in those burgeoning sectors.

Second, even from the narrow standpoint of an individual author's incentives to create, petitioners' assumptions about economic concepts present a caricature of the creative personality. They fail to take into account bequest interests; disregard the effect of international competition on intellectual capital that is highly mobile; and ignore basic influences on optimal copyright terms such as the cost of copying, piracy, and life expectancy. Petitioners and their *amici* thus paint an incomplete portrait that wholly fails to do justice to the complex incentives affecting creative activity, which Congress cannot afford to ignore.

3. Petitioners and their *amici* likewise fail to recognize that Congress's broad authority to make practical judgments in fixing the appropriate duration of copyright terms is inevitably exercised within a competitive international framework. Setting a national policy that reacts to and upon the copyright laws of other countries has always been an important dimension of federal legislation that promotes progress in science and the arts. From this perspective, the CTEA is an important measure that continues the evolution of a distinctively American copyright policy that has changed course over time, but has consistently sought to attract creative talent to the United States and protect our national interest by strengthening the copyright protection on which much of our economy depends. By focusing solely on whether and how the CTEA has succeeded in *harmonizing* American copyright terms

with those of other countries, petitioners miss the larger considerations that have propelled Congress to adjust existing copyright terms.

4. Congress was entitled to exercise its enumerated authority under the Copyright Clause by deciding among competing economic theories about how to promote progress in science and the arts, and by enacting legislation that reflects its considered policy choices. Congress also could reasonably conclude (and did) that extending current and future copyright terms was important to advance American interests within the pervasive scheme of international copyright law. Petitioners' evident disagreement with those policy judgments is not a proper basis for their constitutional challenge to the CTEA.

ARGUMENT

I. UNDER THE COPYRIGHT CLAUSE, CONGRESS MAY EXERCISE ITS ENUMERATED POWERS AS LONG AS ITS ACTIONS ARE REASONABLY RELATED TO ANY PLAUSIBLE CONCEPTION OF ITS LEGITIMATE ENDS.

Apart from certain decisions under the Commerce Clause, where the Court is called on to assess fundamental principles of constitutional federalism, in no case has the Court held that Congress exceeded the proper boundaries of its enumerated powers set out in Article I, Section 8. Petitioners wish to isolate and distinguish the Copyright Clause from the rest of those provisions, in order to establish that this authority is somehow uniquely circumscribed. Those efforts are unavailing.

A. Congress Has Broad Authority Under Article I, Section 8 to Exercise Its Enumerated Powers.

Since its seminal decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court has uniformly held that the enumerated powers specified in Article I, Section 8 confer upon Congress the broadest conceivable authority to implement

those powers effectively. As Chief Justice Marshall stated, the nature of a Constitution, which is "intended to endure for ages to come," *id.* at 415, requires that "only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves," *id.* at 407.

The *McCulloch* Court stated that in "the execution of those great powers on which the welfare of a Nation essentially depends," the Constitution does not limit "the choice of means," but "leave[s] it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end." *Id.* at 415. Since the Constitution authorizes "some choice of means," it permits Congress to "employ those which, in its judgment, would most advantageously effect the object to be accomplished," including "*any* means adapted to the end." *Id.* at 419 (emphasis added).

Having reasoned through the parameters of the enumerated powers conferred upon Congress – in this case, the financial and monetary powers discussed in Article I, Section 8 – the Court summed up its general approach as follows: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional." *Id.* at 421.

In so holding, the Court laid a farsighted path that it would follow for each of the enumerated powers set out in Article I, Section 8. As the Court has said of the taxing power, it will not assume "arbitrary and unreasonable action" by Congress, and will not invalidate a federal law short of such arbitrariness. *United States v. Doremus*, 249 U.S. 86, 93 (1919) (statute must have only "some reasonable relation to the exercise of the taxing authority conferred by the Constitution"). Even with respect to the related uniformity requirement, the Court has held that it will be "reluctant to disturb [Congress's] determination" where, as here, "Congress has exercised its

considered judgment with respect to an enormously complex problem." *United States v. Ptasynski*, 462 U.S. 74, 84-86 (1983). The same broad latitude is understood to be conferred on Congress with respect to the entire array of enumerated powers. *See, e.g., Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937) (Congress's exercise of its authority under the Spending Clause is "obviously a matter of policy and discretion not open to judicial review"); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603-04 (1949) (legislative decisions about appropriate means to govern the Federal District are afforded "great respect" by the Court, regardless of its views about "the wisdom or desirability of such a statute"); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187 (1902) (Congress has "plenary" power under the Bankruptcy Clause); *Ex parte Rapier*, 143 U.S. 110, 134 (1892) ("it must be left to Congress, in the exercise of a sound discretion, to determine in what manner it will exercise the power it undoubtedly possesses" under the Postal Clause); *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (war powers give wide scope for exercise of judgment and discretion and so courts "must give particular deference to the determination of Congress").

In each of these areas of enumerated power, the defining principles of judicial review are the same. In Article I, Section 8, the Constitution expressly identifies broad powers for Congress to exercise as it sees fit after weighing the relevant considerations. Decisions that Congress reaches in choosing among alternative policies are not subject to reconsideration by the courts: "*all* means which are appropriate, [and] which are not prohibited," are constitutional. *McCulloch*, 17 U.S. (4 Wheat.) at 421 (emphasis added). In short, the enumerated powers of Congress confer "broad, often plenary authority over matters within its recognized competence." *Alden v. Maine*, 527 U.S. 706, 713 (1999).

B. Congress's Enactment of the CTEA Under the Copyright Clause Merits Substantial Deference.

Congress's exercise of its authority under the Copyright Clause is subject to the same principles that apply when it implements each of the other powers enumerated in Article I, Section 8. Nonetheless, petitioners argue that the Copyright Clause is unique, allegedly because it is "the only clause in Article I" that specifies both the ends and the means for legislative action, Pet. Br. 15, and thus should be subject to some form of "heightened review," *id.* at 31-32.[2]

Petitioners are wrong. The vast taxing and spending powers are formulated in similar terms: Congress is authorized to "lay and collect Taxes, Duties, Imposts and Excises" and to "pay the Debts" in order to "provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Any constraint potentially imposed by the "general welfare" proviso is minimal, however, for the courts "should defer substantially to the judgment of Congress" on this point. *Helvering v. Davis*, 301 U.S. 619, 640-45 (1937). Legislative power over the militia is expressed in like fashion: Congress is given the power to "provide for calling forth the Militia" in order to secure specified objectives – "to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cl. 15. Here too, the "decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution." *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506-07 (1870).

The enumerated power to establish copyrights and patents "for limited Times," to "promote the Progress of Science and useful Arts," U.S. Const. art. I, § 8, cl. 8, is no more restrictive than these other provisions. And it does not create any inferior capacity than is extended in all the companion provisions of

[2] Petitioners cite *Goldstein v. California*, 412 U.S. 546, 555 (1973), for this proposition, but there the Court made no such claim of uniqueness.

Article I, Section 8. Accordingly, the Court has long held that implementation of the "limited Times" portion of the clause is "subject to the discretion of Congress." *See Pennock & Sellers v. Dialogue*, 27 U.S. (2 Pet.) 1, 16-17 (1829).

Notably, the plain language of the authority conferred is not phrased so as to sanction *only* laws that are entirely prospective; the "plenary" power granted by the Constitution does not countenance "objection to their validity" on the grounds that "they may be retrospective in their operation." *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843). Indeed, throughout our history, Congress uniformly has legislated in tandem by addressing both current and future terms when it has extended the duration of copyright protection beyond that afforded by existing law (including in the First Congress). *See* Act of May 31, 1790, §§ 1 & 3, 1 Stat. 124-25; Act of Feb. 3, 1831, § 1, 4 Stat. 436-39; Act of Mar. 4, 1909, § 23, 35 Stat. 1080; Pub. L. No. 94-553, § 301, 90 Stat. 2541, 72 (1976); Pub. L. No. 105-298, § 102, 112 Stat. 2827-28 (2000).[3] Contrary to petitioners' view, the Court has consistently affirmed that the provisions of the Copyright Clause "have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles." *Goldstein v. California*, 412 U.S. 546, 561 (1973).[4]

[3] Indeed, petitioners' repeated claim that the CTEA is "retroactive" in its operation is misleading at best. *See, e.g.*, Pet. Br. 2, 7, 11, 13, 23. The effect of the statute is analogous to extension of an existing contract, not to *ex post facto* creation of a previously nonexistent contract, and certainly not to *ex post facto* renunciation of a pre-existing contractual obligation.

[4] By the same token, the Court has repeatedly upheld extensions of the terms of existing patents pursuant to Congress's authority under this same provision. *See, e.g., Eunson v. Dodge*, 85 U.S. (18 Wall.) 414 (1873); *Bloomer v. Millinger*, 68 U.S. (1 Wall.) 340 (1863); *Chaffee v. Boston Belting Co.*, 63 U.S. (22 How.) 217 (1859); *Woodworth v. Wilson*, 45 U.S. (4 How.) 712 (1846); *Evans v. Jordan*, 13 U.S. (9 Cranch) 199 (1815).

C. No Countervailing Concerns About Federalism, Separation of Powers, or Violation of Individual Rights Are Present Here.

In *McCulloch*, the Court stated that in reviewing the validity of a federal statute, "to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This Court disclaims all pretensions to such a power." 17 U.S. (4 Wheat.) at 423. The Court has been faithful to this disclaimer for the better part of two centuries. Whenever the question is whether Congress could sensibly have exercised its enumerated powers by making particular choices among means, or fixing defined parameters in terms of numbers, quantities, or duration, the judiciary has consistently deferred to Congress and given it wide latitude to make such determinations. *See, e.g., Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (disapproving judicial "intrusion into the basic line-drawing process that is preeminently the province of the legislature"); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 553 (1949) ("it is a rare case . . . that a constitutional objection may be made to the particular point which the legislature has chosen").[5] And when the Court has invalidated a law enacted by Congress, it has rested on a clear duty to enforce some overriding constitutional concern as to federalism, separation of powers, or violation of individual rights.

The Court's recent Commerce Clause decisions illustrate one limited category of countervailing concerns – matters of federalism. In these cases, the Court has found it necessary to invalidate federal legislation in order to prevent the Federal Government from exercising general "police power" and preserve "a healthy balance of power between the States and the Federal Government." *United States v. Lopez*, 514 U.S.

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[5] Petitioners concede as much. See Pet. Br. 14 ("Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court.").

549, 552 (1995) (quotation omitted); *see also id.* at 569-83 (Kennedy, J., concurring) (statute "contradicts the federal balance the Framers designed and that this Court is obliged to enforce" to maintain key "structural elements in the Constitution"); *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local."). Because the fundamental principle of federalism is embedded in the structure of the Constitution, an infringement of this principle can lead the Court to nullify a decision that Congress has made about how to exercise its enumerated powers. *See Alden*, 527 U.S. at 713-14 (Congress's enumerated powers inherently limited by States' role in constitutional design of federalism, reinforced by Tenth Amendment). In this instance, however, the 1976 statutory revision expressly preempted all state law providing equivalent rights in the subject matter of federal copyright. *See* 17 U.S.C. § 301(a). Thus no issue as to "Our Federalism" is at stake here.

A second structural roadblock to legislative action is the doctrine of the separation of powers, which likewise can be invoked to invalidate federal statutes that are otherwise enacted within the proper scope of Congress's enumerated powers. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (law enacted under Bankruptcy Clause, which conferred Article III authority on Article I judges, violated separation of powers); *Myers v. United States*, 272 U.S. 52 (1926) (law enacted under Postal Clause, which interfered with President's Article II removal power, violated separation of powers). Because separation of powers – like the essential principle of federalism – is inherent in the structure of the Constitution, it likewise trumps Congress's enumerated powers. Yet in this case there is no basis for discerning any encroachment on the powers of the other branches or any related issues concerning the separation of powers.

The sole remaining way in which the means Congress has chosen to exercise its enumerated powers can be "prohibited," *McCulloch*, 17 U.S. (4 Wheat.) at 421, is where a federal statute violates one of the individual rights guaranteed by the Constitution. Petitioners contend that the CTEA violates the First Amendment, but the Court has long settled that questions about the proper scope of copyright do not implicate principles of free speech because the "distinction between copyrightable expression and uncopyrightable facts and ideas," coupled with "the latitude for scholarship and comment traditionally afforded by fair use," already ensure ample constitutional protection. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-62 (1985).[6]

Since the CTEA does not interfere with any individual rights, the scope of judicial review cannot logically be stricter than the lowest form of scrutiny, which is rational basis review under the Equal Protection Clause. In that context, the Court has explained that a statute must be upheld unless "it rests on grounds wholly irrelevant to the achievement of the [governmental] objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993) (quotation omitted). In this instance, there is no equal protection issue at all; the constitutional challenge is aimed only at the original fount of legislative authority. Accordingly, if the CTEA bears a reasonable relationship to any plausible

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[6] Because *Harper & Row* forecloses any free speech challenge here, it also precludes application of "constitutional doubt" as a basis for rewriting the provisions of the CTEA. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (doctrine of constitutional doubt "is not designed to aggravate that friction [among the branches] by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate"); *Miller v. French*, 530 U.S. 327, 341 (2000) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." (quotation omitted)). Aside from these points, we do not otherwise address the First Amendment issue, which is fully canvassed elsewhere.

conception of how to attain Congress's legitimate ends, it must be upheld as constitutional. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted . . . .").

II. CONGRESS'S DECISION TO EXTEND THE TERM OF CURRENT AND FUTURE COPYRIGHTS IN THE CTEA LIES WELL WITHIN THE REALM OF ITS CONSTITUTIONAL AUTHORITY.

The CTEA is reasonably related to a plausible conception of how to "promote the Progress of Science and useful Arts" in at least two ways: (1) Congress made a reasonable choice among competing economic analyses of how further extension of copyright terms would affect incentives to create new works and preserve and disseminate existing works, both for individuals and for the entities that are increasingly vital to organizing and funding large-scale creative ventures; and (2) Congress reasonably determined that the CTEA would position American copyright policy advantageously in the framework of international copyright law.

At the outset, it bears emphasis that Congress carefully considered the provisions of the CTEA over the course of several years. As discussed below, in the two decades after the Copyright Act was passed in 1976, new developments revolutionized the international regime of copyright law. After 1989, when the United States acceded to the Berne Convention, American copyright law entered a novel phase, in which "foreign and international copyright are subjects of unprecedented importance." 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 17.01, at 17-4 (1998). In reaction to changes in copyright law worldwide, a bipartisan group of Senators introduced the CTEA on March 2, 1995 "to safeguard the Nation's economic interests and those of America's creators in the protection of copyrighted works

abroad." S. Rep. No. 104-315, at 5 (1996). Three sessions of Congress later, after hearings in both chambers generated extensive written and oral testimony building on investigations and materials by international tribunals, the CTEA was enacted.

In particular, Congress noted that around 1960, "the Permanent Committee of the Berne Union began to reexamine the sufficiency of the life-plus-fifty-year term of protection" that had long been the norm in Europe but only belatedly was adopted in the United States in 1976. S. Rep. No. 104-315, at 7. As a result, the European Union issued a directive in 1993 that its member countries must implement a term of protection equal to the life of the author plus 70 years by 1995. *See id.* Many other countries have followed. As this figure promised to become the new global standard, and as Congress considered the unprecedented effects of "the information superhighway," which exploded into existence in the past two decades and now "offers widespread distribution of copyrighted works to almost anywhere in the world at limited costs," *id.* at 8, it was judged advisable to address these issues by enacting the CTEA. In short, this legislation was not the product of "momentary political convenience," *Lopez*, 514 U.S. at 578 (Kennedy, J. concurring); instead, it was carefully crafted in response to substantial new concerns generated by changes in technology, international law, and foreign markets.

A. The Economic Analysis of the CTEA by Petitioners and Their *Amici* Is Inadequate and Incomplete.

The arguments presented by petitioners and their *amici* are sharply undermined by a series of mistaken or misleading assumptions about the economic theories that support the copyright and patent laws. For example, petitioners incorrectly assume that the *only* way Congress can legitimately seek to promote the progress of science and the arts is by providing the prospect of immediate financial rewards that will induce individuals to create new works in order to advance their own

personal economic self-interest, narrowly conceived. *See, e.g.*, Pet. Br. 19-23. But that is only a small part of the total picture, as fewer and fewer creative works of art, entertainment, and education result from the concentrated efforts of a solitary creator in a garret who depends on the generosity of a patron or the beneficence of the government. In today's world, the production of many types of copyrighted works requires assembling people with diverse talents and skills, backed by extensive financial resources, to produce, market, and distribute the resulting works successfully. These capabilities in turn provide dramatic new incentives for individual creators.

Indeed, some of the most popular forms of modern creative expression – motion pictures, television, and music – are the products of a multitude of creative individuals, including writers, producers, performers, video operators, recording engineers, and corporate executives, along with an array of technicians and artisans. And the contribution that these works make to progress in science and the arts is maximized when they are made available to the widest possible audience. The exclusivity that the copyright laws provide to copyright holders is essential to make it possible for them to undertake the enormous expense involved in bringing these works to public attention through advertising and promotion, as well as packaging and delivering these works for exhibition, sale, and rental without fear that their efforts will be undercut by rival distributors who seek to "free ride" upon their efforts.

A principal reason why institutional entities have become central to the creation of new works in the copyright sectors is that the cost and frequency of failure have become so extraordinarily high. The recording industry alone "spends more than $1 billion a year on nurturing and developing artists, even though 90% of all music releases are unsuccessful." Tamara Conniff, *Sea Changes in Music Biz Leave Rank and File Adrift*, Hollywood Rptr., June 21, 2002, at 1, 21. The cost of marketing and promoting new music to radio ranges from

$250,000 to $1 million per single. *See id.* This is also "particularly important in the case of corporate copyright owners, such as motion picture studios and publishers, who rely on the income from enduring works to finance the production of marginal works and those involving greater risks (*i.e.*, works by young or emerging authors)." S. Rep. 104-315, at 12-13. And these financial concerns have been exacerbated in recent years by significant and growing problems with piracy both in this country and around the world. *See* Edna Gundersen, *Any Way You Spin It, the Music Biz Is in Trouble*, USA Today, June 5, 2002, at 1A.

Extension of existing copyright terms thus directly affects the incentives and capabilities of these institutional entities to create new copyrighted works. The profits generated by exclusive rights over the rare successes in these high-risk endeavors are the seed corn needed to sow the fields for the next round of creative works. The steady stream of profits from the older classic films of the Turner Library, or from musical compositions like Gershwin's *Rhapsody in Blue* – which continue to generate millions of dollars in revenue but whose copyright protection would be slated to expire but for the CTEA – makes the "tail-end" years of copyright protection extraordinarily important, even though most works have a much shorter shelf-life.[7] Congress could reasonably conclude that the special importance of these rare works, and their capability under copyright protection to subsidize the cost of new creative works, justified the term extension enacted in the CTEA.

Given that the copyright sectors now constitute 5.7 percent of the total gross domestic product – and represent our second

[7] Indeed, Congress had before it a report that estimated the annual royalties of book, music, and movie copyrights expiring in each of the years affected by the term extension provided by the CTEA, which grew steadily from an aggregated $53 million in 2002 to an aggregated $317 million in 2017. *See* Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, Cong. Research Serv. Rep. 16 (May 11, 1998).

largest export, with $40 billion in foreign sales in 1994 – it is eminently reasonable for Congress to calculate that specific measures to boost profits in these industries will directly serve to promote "Progress of Science and the useful Arts" within the meaning of the Copyright Clause. *See* S. Rep. No. 104-315, at 9. Extension of copyright terms also renders it economically feasible for those entities to utilize newly developed technologies to make existing works available in new and attractive formats to new as well as repeat audiences, again serving to promote science and the arts. *See id.* at 13.

In addition, Congress had an even more immediate and tangible objective in mind with the CTEA, when it extended the duration of existing and future copyright terms to life of the author plus 70 years. Based on an EU directive, all member states in the European Union are to harmonize their copyright laws by adopting this same span. *See* Council Directive 93/98, 1993 O.J. (L 290/9). Each is also directed to apply the "rule of the shorter term" to countries outside the EU, *see id.* art. 7, which means that if the U.S. law provides shorter terms, then U.S. copyright holders will not receive the full protection otherwise afforded in the EU. Thus the CTEA "ensure[s] that profits generated from the sale of U.S. intellectual property abroad will come back to the United States." H.R. Rep. No. 105-452, at 4 (1998). Even on petitioners' own terms, this represents substantial additional funding for American authors to subsidize the creation of new works. *See* 141 Cong. Rec. S3391-93 (daily ed. Mar. 2, 1995) (statement of Sen. Hatch).

From the standpoint of an individual author, moreover, petitioners and their *amici* omit key incentives for creative activity. For instance, they downplay bequest interests, which generate distinct financial motivations for many individuals later in life. In fact, "we know that bequest motives play a role in people's decisions to work, save, and so on, and those motives depend on the altruistic feelings that people have, primarily for members of their family, including descendants."

William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 363 (1989).[8]

In the United States, as in Europe, policymakers found that general prolongation of the expected life span required existing copyright terms to be adjusted. Since "the majority of American creators anticipate that their copyrights will serve as important sources of income for their children and through them into the succeeding generation," the CTEA discarded the life-plus-50 term and replaced it with a life-plus-70 term to reflect the longer lives of their children and grandchildren. S. Rep. No. 104-315, at 10-11; *see* H.R. Rep. No. 105-452, at 4 (same); Council Directive 93/98, recital (5), 1993 O.J. (L 290/9) (same). That squares with rudimentary economic theory, since an increase in the life span of one's heirs justifies a corresponding increase in the amount of protection passed on at the author's death. But petitioners simply decline to credit such considerations.[9]

Other factors similarly bear upon the proper scope of copyright protection. As the cost to make a copy of an existing

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[8] One example is the grim battle Ulysses Grant waged to write his *Memoirs* before his death from cancer, shortly after he lost all his money when his banking partner defrauded investors. Grant worked doggedly for nine months to save his family from financial ruin, and the two volumes, completed five days before his death, ultimately did so by generating almost $450,000 in royalties for his widow. *See* Ulysses S. Grant, *Memoirs and Selected Letters* 1157-61 (Library of America 1990) (1886). In petitioners' account, such conduct could only be regarded as irrational.

[9] Consideration of bequest interests means that it is no longer proper simply to discount everything to the individual author's own present value. And the discounting performed by petitioners' *amici* is lacking in another important respect: although they have discounted the anticipated *revenue* from an extension of existing terms, on the other side of the ledger they have not discounted any of the anticipated *costs* that would be incurred in future creative activity. *See* Econ. Br. 5-7 & App. B. Thus the entire calculus has been left incomplete. *See* Landes & Posner, *supra*, at 362.

work decreases, economic analysis suggests that the optimal term of copyright protection should be increased. *See* Landes & Posner, *supra*, at 341-44, 363. And this has indeed been a notable effect of the recent explosion of information technology. Because of the dramatic strides made in reproduction, display, and distribution of documents, information, audio, and video through computers and the Internet since 1976, it would be remarkable if the scope of copyright protection had not been extended over this same period, and indeed Congress found it necessary to extend copyright terms in part for this reason. *See* S. Rep. No. 104-315, at 6-7. Moreover, serious and growing problems of piracy now plague all the copyright sectors, increasing costs and reducing revenues. *See* 143 Cong. Rec. S6048 (daily ed. June 2, 1997) (statement of Sen. Abraham). Accordingly, copyright protection must be expanded to maintain the same level of financial incentives and rewards for copyright holders. *See Sony Corp.*, 464 U.S. at 430-31 ("From its beginning, the law of copyright has developed in response to significant changes in technology. . . . Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.").

It is not necessary that any of these economic points, taken alone or together, be found compelling. Instead, it is enough that they provide plausible grounds for Congress to make judgments about how to proceed in evaluating and acting upon legislative proposals like the CTEA. As Justice Holmes aptly said, the Constitution "does not enact Mr. Herbert Spencer's *Social Statics* [or] embody a particular economic theory, whether of paternalism . . . or of laissez faire." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Even if petitioners' account of the relevant economic analysis of the copyright sectors were not flawed in important respects, there can be no doubt that these issues and theories are debatable. In the face of competing views about how to attain its legitimate

ends, Congress is entitled to make such reasonable judgments within the province of its enumerated powers.[10]

B. Longstanding Concerns About Locating American Copyright Policy in the Structure of International Law Warrant Deference to Congress.

The CTEA reflected deep concern in Congress about how changes in domestic copyright policy would affect our position in the framework of international copyright law. *See* S. Rep. No. 104-315, at 3-10; H.R. Rep. No. 105-452, at 3-4. This is hardly surprising, for the history of American copyright law shows that Congress has been sensitive to how our laws interact with those of other nations. Because of this careful attention to the importance of international law and markets for intellectual property, "the Federal patent and copyright systems are now the largest in the world, and support a technological and intellectual outpouring which has given the United States primacy in power and influence among nations." Bruce W. Bugbee, *Genesis of American Patent and Copyright Law*, at v (1967).

1. Congress's Need for Flexibility to Respond to Evolving Considerations in Copyright Policy.

Congress's views about how copyright policy should be shaped to promote progress in the fields of creative endeavor have evolved greatly through the years. A brief review of this history confirms the importance of allowing Congress flexibility to adjust copyright policy in light of the complex domestic and international considerations that have arisen over time.

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[10] Petitioners also frequently allude to the evils of "monopolies," Pet. Br. 10, 22-26, though the wide gulf between legal protection of intellectual property and grant of a monopoly privilege was recognized long ago. *See Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 607 (1837) (quoting Edward Coke, III, *Institutes of the Laws of England*, c. 85). In the years since, legal developments such as the "fair use" doctrine and the idea/expression distinction have widened this gulf even further.

During the Revolutionary War, Paine advocated "the honour and service of letters, and the improvement of science" by laws "to prevent depredation on literary property," pointing to Russia and France for their "wise encouragement" of science and learning. Thomas Paine, *Letter to the Abbe Raynal, on the Affairs of North America* (1782), *in The Complete Writings of Thomas Paine* 213 n.1 (Philip S. Foner ed., 1945). The First Congress responded, enacting copyright protection for maps, charts, and books authored by citizens or residents of the United States and their executors, administrators, or assigns. *See* Act of May 31, 1790, § 1, 1 Stat. 124.

It is striking, however, that for decades the United States was aggressively a pirate nation, affording no copyright protection at all to foreign works. *See id.* § 5, 1 Stat. 125. The first revision of the copyright laws extended the same approach. *See* Act of Feb. 3, 1831, § 8, 4 Stat. 438; 4 *Nimmer on Copyright* § 17.01[C][1], at 17-12. In an era when American literary production was in gestation, this regime promised to maximize opportunities to bring foreign works cheaply into the American marketplace, and was strongly supported by domestic publishers. It also encouraged foreign authors to come to the United States if they wished to profit from their works here. Yet it had the perverse effect of flooding American markets with pirated works by uncompensated English writers. This stifled the growth of American letters to the point where, as late as 1820, one British wag famously exclaimed, "'In the four quarters of the globe, who reads an American book?'" *United Dictionary Co. v. Merriam Co.*, 208 U.S. 260, 264 (1908).

The drawbacks and injustices of this scheme fueled pressure for legislative reform.[11] Not until 1891, however, did

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[11] During the same period, Chancellor Kent drew on comparisons with German, French, and British law to criticize "the scanty and inadequate protection" that Congress afforded to copyright terms. 2 James Kent, *Commentaries on American Law* 306-14 (1827).

Congress accept reciprocity as a key feature of American copyright law, by extending protection to foreigners whose countries did the same for Americans. *See* Act of Mar. 3, 1891, § 13, 26 Stat. 1106. Resistance from the printing industry was eased by the "manufacturing clause," which provided certain elements of protectionism for the benefit of American printers. *See generally* S. Rep. No. 94-473, at 146-51 (1975).[12]

During the same period, concerns about parochial treatment of foreign authors spawned broader initiatives to create an international structure for copyright law. The ultimate product of these deliberations was the Berne Convention for the Protection of Literary and Artistic Works, which created a new framework for coordinating national copyright laws, based on the principle of "national treatment" of foreign works from other treaty nations (*i.e.*, treatment on the same footing as domestic works) combined with a set of minimum required rights. Although the United States refused to join the Berne Convention for more than a century, Congress maintained a policy of reciprocity in its further revisions to the copyright laws. *See* Act of Mar. 4, 1909, § 8, 35 Stat. 1077.

On the diplomatic front, the United States operated by bilateral agreements with other countries. In 1955, we joined the Universal Copyright Convention, our first multilateral copyright organization. In 1989, we finally acceded to the Berne Convention, which had emerged "as the governing instrument in the world of international trade," joining more than 100 other nations. 4 *Nimmer on Copyright* § 17.01, at

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[12] In an influential article, the Assistant Register of Copyrights commented: "Until the Second World War the United States had little reason to take pride in its international copyright relations; in fact, it had a great deal to be ashamed of. With few exceptions its role in international copyright was marked by intellectual shortsightedness, political isolationism, and narrow economic self-interest." Barbara A. Ringer, *The Role of the United States in International Copyright – Past, Present, and Future*, 56 Geo. L.J. 1050, 1051 (1968).

17-4. American copyright law thus entered a new phase, in which "internationalization is an integral component of U.S. copyright lawmaking." Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. Pa. L. Rev. 469, 483 (2000).

Much of this change is attributable to sheer economics. Until World War II, the United States was a net copyright importer, but since then it has become the principal copyright exporter in the world. *See Hearings on S. 1301 & S. 1971 Before the Subcomm. on Patents, Copyright & Trademarks of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess., at 57 (1988) (testimony of Rep. Kastenmeier). The tremendous growth of the copyright sectors of the American economy has raised this country to global primacy in the realm of intellectual creativity. "Over 40 percent of our revenue currently comes from foreign markets and our greatest opportunity for growth is overseas." 4 *Nimmer on Copyright* § 17.01, at 17-4 n.1.1 (quotation omitted). In consequence, the United States has assumed the mantle of world leadership by setting an example that encourages other nations to adopt strong, balanced copyright protection and to reduce piracy, which causes losses for American copyright holders that have "mounted into the billions of dollars." *Id.* § 17.01[C][1], at 17-15.

In its efforts to promote progress in science and the arts, Congress has thus swung from a stubborn policy of protectionism, to one of measured reciprocity, to the current policy of outspoken leadership in advocating closer global integration of national regimes of copyright law. This evolution in Congress's perceptions about how best to foster progress in science and the arts shows why the Court should not now decide that only one single approach is permissible. *See Stewart v. Abend*, 495 U.S. 207, 230 (1990) ("evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces [and] it is not our role to alter the delicate balance Congress has labored to achieve"). Instead,

Congress should maintain the flexibility to respond to changes in the international sphere by calibrating matters like the optimal duration of copyright terms in light of the incentives that it concludes are needed to keep the United States at the global forefront in producing intellectual property. *See McCulloch*, 17 U.S. (4 Wheat.) at 407 ("we must never forget, that it is a *Constitution* we are expounding") (emphasis in original).

Petitioners' focus – which dwells on providing immediate financial incentives for individual authors to produce new works, *see, e.g.*, Pet. Br. 19-23 – represents a strait-jacket that the Court should be loath to embrace. Their narrow approach fails entirely to come to grips with the multi-faceted considerations of foreign trade, cultural and economic policy, and diplomatic relations that have constantly informed American copyright policy for over two centuries. The Copyright Clause itself bars Congress from granting perpetual copyrights by confining them to "limited Times." *See, e.g.*, *Sony Corp.*, 464 U.S. at 443 n.23 ("copyright protection is not perpetual"). Yet it does not otherwise restrict Congress from making reasonable choices, including whether to advance current (and mutable) perceptions about how to "promote the Progress of Science and useful Arts" by extending the terms of existing and future copyrights in light of the protections afforded elsewhere in the world. U.S. Const. art. I, § 8, cl. 8.

Congress has explicitly recognized that "[c]opyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless." S. Rep. No. 94-473, at 118 (1975). Faced with the increasing mobility of intellectual capital, Congress has consistently sought to adapt the copyright statutes to protect American interests. At this juncture, Congress could sensibly conclude that those interests may best be promoted by extending the rights of current and

future copyright holders in the United States to match or exceed the protections conferred on their competitors in important foreign markets.

Indeed, the pertinence of international concerns warrants even greater deference to Congressional judgments. *See, e.g.*, *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Here, in fact, Congress's own judgments reflected those articulated by the Executive Branch. *See* 134 Cong. Rec. H3082 (daily ed. May 10, 1988) (statement of Rep. Kastenmeier) ("'it is often hard to convince other countries to provide strong copyright protection when we do not'") (quoting Letter of U.S. Trade Rep. Clayton Yeutter). The CTEA is an important measure that continues the evolution of a distinctively American copyright policy that has changed course over time, but consistently has sought to foster creative activity, initially by a protectionist policy and now by asserting global leadership to build on the pre-eminent strength of the copyright sectors of our economy. One might regard these policies as inconsistent or even misguided at times, but none is unconstitutional. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928) ("Whatever we may think of the wisdom of a protection policy, we cannot hold it unconstitutional.").

2. *The CTEA Is Valuable in Securing Export Revenues and Positioning Domestic Policy in the Context of International Copyright Law.*

By focusing solely on whether and how the CTEA has succeeded in *harmonizing* American copyright terms with those of other countries, *see, e.g.*, Pet. Br. 42-44, petitioners miss the larger international considerations that have propelled Congress to adjust existing copyright terms. For example, the intellectual property law professors concede that the CTEA "may, as its sponsors promised, 'ensure that the United States will continue to receive the enormous export revenues that it does today from the sale of its copyrighted works abroad.'" IPLP Br. 6-7 (quoting Cong. Rec. H9950 (Oct. 7, 1998) (remarks of Rep.

Coble)). Yet they simply assert an absolute disconnect between this result and the creation of new works, while complaining that the harmonization of American and European copyright terms remains incomplete. *See id.*

Both points reflect a flawed perspective. First, as noted above, securing hundreds of millions of dollars in export revenues – all of which would otherwise be forgone – provides considerable new capital for American institutional entities in the copyright sectors, much of which will be plowed back into financing, marketing, and distributing new creative endeavors, including by way of payments to individual authors. At a minimum, Congress could legitimately conclude that this was *likely* to be one of the desirable consequences if current and future copyright terms were extended. *See* S. Rep. No. 104-315, at 3 (purpose of CTEA "is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works").

Second, even if the CTEA left the harmonization of international copyright terms imperfect in various respects, it would be enough for Congress to determine that *closer* harmonization or even incremental harmonization in certain important aspects would be advantageous to individuals and institutions in the copyright sectors of the American economy – which is surely plausible here. *See, e.g.*, *Heller*, 509 U.S. at 321 (courts are compelled "to accept a legislature's generalizations even when there is an imperfect fit between means and ends").[13] Finally, petitioners' approach ignores the broader benefits resulting from the ability of the United States

[13] Petitioners criticize the CTEA for moving the United States from a majority rule on copyright terms (life plus 50) to a minority rule (life plus 70), *see* Pet. Br. 43, without ever acknowledging that the latter rule is the evolving international trend, with a growing list of nations – including many of those with the largest markets for American copyrighted works – now adopting the longer term.

to play a leadership role in the international copyright system, which includes shaping global norms for appropriate protection in response to new technologies.

C. The CTEA Is Reasonably Related to a Plausible Legislative Conception of How to Promote Progress in Science Within the United States.

These concerns about foreign trade and international law amply justify Congress's decision to enact the CTEA. In sum, there are at least *five* ways in which Congress could (and did) sensibly conclude that extending current and future copyright terms is reasonably related to a plausible conception of how to promote progress of science and the arts in the United States, based on its multi-year consideration of the CTEA.

First, extending our copyright terms to match the European Community avoids expected losses to American copyright holders from application of the "rule of the shorter term." The direct result is to capture all available profits from such exports, which provides additional financial incentives for copyright holders (including both institutional entities and individuals) to "produce [new] works," "restore older works and further disseminate them to the public." H.R. Rep. No. 105-452, at 4; *see also* S. Rep. No. 104-315, at 4-5, 8-10. Increased financial incentives, as even petitioners concede, are likely to "promote Progress" in science and the arts here in the United States.

Second, extending our copyright terms to reflect changes in average life span, the cost of copying, and the expected useful life of creative works increases the incentives to create new works, to invest in preserving existing works, and to develop ways to make them accessible to the public, such as digital formatting. *See, e.g.*, S. Rep. No. 104-315, at 10-13.

Third, establishing closer harmonization between the terms of American and European copyrights – even if that harmony remains imperfect – lessens the burdens and costs of doing business internationally for American copyright holders, which

creates further incentives to produce new creative works. *See, e.g.*, *id.* at 8. This concern is underscored by the "information superhighway," which now "offers widespread distribution of copyrighted works to almost anywhere in the world at limited costs," but is hampered by the complexities and strategic issues posed by different copyright terms in distinct markets. *Id.*

Fourth, the United States can advance its objective of strengthening copyright protection in other nations by conferring greater protection within its own borders. This in turn solidifies our global leadership role in setting appropriate copyright standards, and improves our ability to fight "[f]oreign piracy of intellectual property," which has emerged "as one of the most important international trade issues for the United States." *GAO Report on Intellectual Property Protection Abroad*, Apr. 1, 1987, in 1987 Copyright L. Rep., New Dev. (CCH) ¶ 20,438. The expected consequence would be to increase profits for American copyright holders by boosting exports of intellectual property, thereby generating billions of dollars in additional financial incentives for the creation of new works here. *See, e.g.*, S. Rep. No. 104-315, at 7-8.

Fifth, by making good on an implicit promise that American copyright law will be updated regularly to provide strong protection for authors, Congress provides more incentive and greater security for foreign and domestic copyright holders to locate in the United States, thereby promoting progress in science and the arts here. *See, e.g.*, S. Rep. No. 104-315, at 9.[14]

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[14] The "outer limits" of this strategy, of course, are set by the Constitution, *Lopez*, 514 U.S. at 566, which would not permit *either* copyright terms in perpetuity *or* terms that bear no reasonable relation to any plausible conception of how to advance the legitimate objectives of the Copyright Clause. Neither boundary is implicated here; indeed, the term set by the CTEA fits comfortably within traditional legal notions of a "limited" rather than a "perpetual" estate. *See, e.g.*, Uniform Statutory Rule Against Perpetuities, 8 U.L.A. § 1(a)(2) (uniform proposed law adopted by 19 States provides 90-year period for contingent property interests to vest).

Importantly, with respect to each of these rationales, in order to achieve the stated objectives it is essential to adopt uniform rules for all works of a particular kind, such as by extending *both current and future* copyright terms in tandem. Again, the text of the Constitution itself draws no distinction in this regard, and the lessons of economic theory and international copyright law are equally applicable to both types of term extension.[15] And this has been the uniform historical practice over the years, whenever Congress has extended the existing terms of patents and copyrights, *see* p.9 & n.4, *supra*, which itself is strong evidence supporting the constitutionality of this approach. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936) ("The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.").

The vast disruption of investment-backed reliance interests that would occur if the CTEA were struck down is also highly relevant. Judicial invalidation of this statute "would defeat the reliance interest of those corporations which have structured their activities" based on provisions extending existing copyright terms, and thus would "disrupt settled expectations in an area of the law in which the demands of the national economy require stability." *Allied-Signal, Inc. v. Director, Div. of Tax'n*, 504 U.S. 768, 786-87 (1992). Countless transactions and business decisions have been based on valuations of copyrighted works made in line with existing law, and they cannot now be undone. *See* Arnold Plant, *The Economic Aspect of Copyright in Books*, 1 Economica (n.s.) 167, 194 (1934) ("in a matter which affects so large and valuable a

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[15] The Berne Convention likewise requires protection to be granted to all works whose terms had not yet expired and thus had "not yet fallen into the public domain" in the country of origin. *See* Berne Convention, art. 18(1).

property, and so many vested interests as have been created under copyright laws," it is "unjust and inexpedient" to change the law "except in the most gradual and tentative manner") (quotation omitted). A ruling that overturns the CTEA would trigger large, unanticipated transfers of wealth, both within and away from the copyright sectors, including the loss of massive export revenues that Congress had captured to finance and promote further creative activity here in the United States. No such result can be justified.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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